No. 91-1657

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHARLENE LEATHERMAN, ET AL.,
Petitioners

vs.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, ET AL.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

VAN THOMPSON, JR.
Assistant District Attorney
State Bar No. 19960000
401 West Belknap
Fort Worth, Texas 76196-0401
(817) 884-1233

Attorney for Respondents

Tarrant County Narcotics Intelligence and Coordination Unit, Tarrant County, Texas, Don Carpenter and Tim Curry

Fort Worth Brief Printing Co., 600 South Jennings Avenue, Fort Worth, Texas 76104 - Phone 817-332-4070

QUESTION PRESENTED

Whether the dismissal under Rule 12(b)(6), FED. R. CIV. P., of a civil rights action brought pursuant to 42 U.S.C. §1983 for failure to comply with "heightened pleadings" requirements is contrary to the "notice" pleading of Rule 8, FED. R. CIV. P., and prohibited by the Rules Enabling Act, 28 U.S.C. §2072(b)?

LIST OF PARTIES

PETITIONERS:

Charlene Leatherman and Kenneth Leatherman, individually and as next friend of Travis Leatherman; Gerald Andert, Kevin Lealos and Jerry Lealos, individually and as next friend for Travor Lealos and Shane Lealos, Pat Lealos, and Donald Andert.

RESPONDENTS:

Tarrant County Narcotics Intelligence and Coordination Unit; Tarrant County, Texas, Tim Curry, in his official capacity, and Don Carpenter, in his official capacity; City of Lake Worth, Texas; and City of Grapevine, Texas.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Tarrant County Intelligence and Coordination Unit, Tarrant County, Texas, Don Carpenter, in his official capacity as Sheriff of Tarrant County, Texas, and Tim Curry, in his official capacity as Criminal District Attorney of Tarrant County, Texas, respectfully request that the Court deny the Petition for writ of certiorari, which seeks to review the opinion and judgment of the United States Court of Appeals in Leatherman et al., v. Tarrant County Narcotics Intelligence and Coordination Unit, et al., reported in 954 F.2d 1054 (5th Cir. 1991), affirming the Judgment and Memorandum Opinion of the District Court, reported at 755 F.Supp. 726 (N.D. Tex. 1991).

JURISDICTION

These respondents do not challenge the statutory provision on which Petitioners rely for jurisdiction, nor is the timeliness of the petition questioned.

STATEMENT OF THE CASE

The original Plaintiffs, Charlene Leatherman, Kenneth Leatherman, individually and as next friends for Travis Leatherman, brought suit under 42 U.S.C. §1983 in the 96th Judicial District Court of Tarrant County, Texas, against the Tarrant County Narcotics Coordination and Intelligence Unit and Tarrant County, Texas, alleging violation of their constitutional rights guaranteed under the 4th, 5th, and 14th Amendments of the Constitution, under various sections of the Texas Constitution, and under the common law of Texas, because of an asserted illegal arrest and detention of Plaintiffs and destruction of Plaintiffs' dogs by unnamed officers during the execution of a search warrant on property and a residence occupied by Plaintiffs.

Defendants removed this cause to the United States District Court, and moved for dismissal or for summary judgment, pursuant to Rules 12(b)(6) and 56, FED. R. CIV. P. This motion was not responded to and was granted by the District Court.

Plaintiffs moved to vacate the Order of Dismissal and requested leave to amend their pleadings "to conform to the technical pleading requirements under 42 U.S.C. §1983." Although Defendants opposed this motion for the reason that no justification was presented by Plaintiffs for their failure to respond to Defendants motion or to adduce any controverting summary judgment evidence, the Order of Dismissal was vacated and Plaintiffs were allowed to amend.

By Amended Complaint, in addition to the original Plaintiffs, a whole new set of parties complaining of an additional entirely separate and different occurrence were added, and District Attorney Curry and Sheriff Carpenter were added as new additional Defendants in their official capacities only. In the Amended Complaint both sets of Plaintiffs asserted violation of their constitutional rights guaranteed under the 4th and 14th Amendments of the Constitution to be free of unreasonable search and seizure. By entirely conclusory allegations Plaintiffs claimed that the alleged civil rights violations were the result of failure of the Defendants to properly train law enforcement officers under their control (a) as to the proper manner in which to respond when confronted by family dogs when executing search warrants, and (b) "to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed." Plaintiffs also claimed that the search and arrest warrants involved "were invalid when issued and do not state probable cause because they are based on the detection by the officers seeking the warrants of odors associated with chemicals utilized in the manufacture of illicit drugs by clandestine drug laboratories." Plaintiffs asserted this was "insufficient as a matter of law to establish probable cause." Plaintiffs alleged because of the "custom, policy or practice" of Defendants TCNICU and Tarrant County to prepare and seek such warrants liability could be imposed upon these entities.

By Motion to Dismiss or for Summary Judgment Defendants sought dismissal of the Amended Complaint pursuant to Rule 12(b)(6), FED. R. CIV. P., for failure to state any claim upon which relief may be granted, or, in the alternative for summary judgment under Rule 56, FED. R. CIV. P.

Plaintiffs then filed a massive request for production of documents requesting every file of the TCNICU since its

inception in 1988 wherein a search warrant had been sought based primarily on the detection of the distinctive odors associated with the clandestine manufacture of amphetamines. This would have required the examination of several thousand files. No discovery was ever attempted concerning the training or supervision of the officers executing search warrants on behalf of Tarrant County or specifically the TCNICU. This is the only discovery request made by Plaintiffs in this action, although belatedly some depositions were taken from the individual law enforcement officers involved.

Defendants filed their Motion for Protective Order as to Plaintiffs' Request for Production of Documents which was granted.

Plaintiffs filed their Reply and Brief in Opposition to Defendants' Joint Motion to Dismiss or for Summary Judgment, and a Supplemental Response to Defendants' Joint Motion to Dismiss or for Summary Judgment.

The District Court granted Defendants' Motion to Dismiss or for Summary Judgment and ordered Plaintiffs' complaint dismissed and that Plaintiffs recover nothing from any of the Defendants. On the same date the District Court filed its Memorandum Opinion and Order setting forth its reasons for the dismissal of Plaintiffs' complaint.

The Court of Appeals affirmed the Judgment of the District Court. Although the 5th Circuit opinion was predicated on Plaintiffs' failure to allege any specific facts in support of its claims of failure to train and unconstitutional policy, this result could equally have been supported on the ground that Plaintiffs entirely failed to support their claims by any summary judgment evidence.

REASONS FOR DENYING THE WRIT

A. Notice Pleading Not Satisfied

The Amended complaint in the instant cause wholly failed to identify any specific deficiency in training by any law enforcement agency or its governing body or to identify any close causal nexus between the alleged deficiency and the asserted injuries of either group of Plaintiffs. Plaintiffs' "failure to train" allegations would not satisfy even "notice pleading" requirements. The complaint is insufficient under the recognized standards of this Court.

In the seminal failure to train case, *City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S.Ct. 1197, 1205 (1989), the Court stated the elements of a "failure to train" claim under which a local governmental entity can be held liable under §1983:

> "Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under §1983 . . .
>
> Monell's[1] rule that a city is not liable under §1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible.

The Court went on to identify the elements required for liability to attach for failure to properly train plaintiff must show (1) the specific deficiency in training, (2) that such deficiency represents "policy," and (3) a close relationship to the injury claimed. Id. at 1205-06. A plaintiff attempting to assert a

[1] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

§1983 action based on "failure to train," is required to state these necessary elements, which Plaintiffs here did not even attempt. Clearly, the Court by analogy rejected an approach like that of Plaintiffs here of merely invoking the magic conclusionary language of "failure to train." It is abundantly clear in *City of Canton* that a bald assertion that a local governmental entity has an unconstitutional policy is insufficient. Essentially that is all Plaintiffs did in this case.

B. There Were Alternate Grounds For Affirmance

Although the District Court also granted summary judgment to Defendants herein,[2] the Court of Appeals herein did not reach the question of the correctness of this ruling.[3] However, the Judgment of the District Court is fully supportable on this basis because Plaintiffs did not adduce a shred of summary judgment to support any of the elements required to support their conclusory "failure to train" and "policy" allegations.

Rule 56(e), FED. R. CIV. P., requires that the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." The party moving for summary judgment need not produce evidence showing the absence of a genuine issue of material fact with respect to an issue as to which the nonmoving party bears the burden of proof, "since a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rather, the

[2]755 F.Supp. at 731: "If the court were to overlook the pleading inadequacies, Plaintiffs nevertheless would be unable to clear the hurdle created by the Rule 56 motion."

[3]954 F.2d at 1058 n. 6: "The district court ruled, in the alternative, that summary judgment was appropriate and that no further discovery was necessary. Because we hold that the district court properly dismissed the complaints based on the insufficiency of the allegations, we need not reach the other issues raised."

party moving for summary judgment need only show that the party who bears the burden of proof has adduced no evidence to support an essential element of his case. *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 325.

As pointed out by the District Court in this cause,[4] Plaintiffs herein have known at least since the first dismissal of this case that factual evidence to support their conclusory allegations of "policy" would be required and that under the requirements of Rule 11, FED. R. CIV. P., they were required to make adequate prefiling inquiry and are "presumed to have knowledge of the factual basis of their suit when they signed the original and amended complaints." Yet to date Plaintiffs have not either pleaded any such facts or attempted to adduce any summary proof to support their conclusory allegations.

[4]755 F.Supp. at 734.

CONCLUSION

For the reasons heretofore stated and discussed Respondents respectfully submit that although Petitioners claim an issue of significant constitutional magnitude is presented by this case, the instant cause is not worthy of the grant of a writ of certiorari because Petitioners did not satisfy even notice pleading requirements stated in *City of Canton, Ohio v. Harris*, *supra*, and Petitioners are foreclosed by alternate grounds of decision not reached by the Court of Appeals.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

VAN THOMPSON, JR.
Assistant District Attorney
State Bar No. 19960000
401 West Belknap
Fort Worth, Texas 76196-0401
(817) 884-1233

COUNSEL OF RECORD

Attorney for Respondents

Tarrant County Narcotics
Intelligence and Coordination
Unit, Tarrant County, Texas,
Don Carpenter and Tim Curry